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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 671

THOMAS J. FITZGERALD, Trustee in Bankruptcy
Petitioner,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Respondent,

In the Matter of

MIDYETT AND MAY CONSTRUCTION COMPANY, a partnership, consisting of Horace Leon Midyett and Ruel Farries May,
Bankrupt.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Where surety had filed in its own name a claim for indemnity against the estate of its bankrupt principal which was denied because not made in the names of bankrupt's creditors whom surety had paid, whether amendment of surety's claims by substitution of names of creditors paid would constitute amplification of an imperfect or defective claim which may be permitted after the expiration of the time for filing claims or whether such an amended claim would be the assertion of an entirely new and different claim not so permitted?

STATEMENT

As originally filed, respondent surety's claim in bankruptcy asserted a contingent liability of $390,409.19 and a liquidated claim of $24,472.86 (R. 2). The latter was the total of amounts which the surety had theretofore paid out on four bonds upon the bankrupt contractor as principal; and the former, the total penalty on two bonds upon which the amount due the obligees had not been determined at the time the claim was filed (R. 3-5).

The original filing was timely (the Court of Appeals determined it to have been within the six-month period after the first date set for the first meeting of creditors 272 F. 2d at 124).

Later, by amendment, respondent surety set forth that its claim had become liquidated in the total sum of $74,713.07, reciting some six bonds upon which respondent became surety for the bankrupt and setting forth in the case of each, the amount of money which "the Fidelity and Deposit Company as surety became obligated to pay and did pay" (R. 14-16).

No objection was made to the amendment upon the ground of its being offered too late or upon the ground that liquidation had not proceeded in good time; rather, objection was made by the Trustee in Bankruptcy upon two other grounds, the pertinent one being: "Said claim is not filed in the names of those creditors of the bankrupt to whom claimant has made payments, as is required by Section 57 (i) of the Act of Congress Relating to Bankruptcy" (R. 17).

This ground of objection was upheld by the Referee as to the bulk of respondent's claim (R. 19-20). The motion which respondent had made for leave to amend further so that the amended claim would be asserted in the names of the creditors whose claims against the bankrupt had been discharged by respondent (R. 19) was denied by the Referee. The ground of denial stated was that the proposed amendment would be the assertion of a new claim or claims after the time for filing claims had elapsed (R. 20).

The District Court denied respondent's petition for review and affirmed the order of the Referee. The Court of Appeals reversed the District Court, holding that leave should have been given respondent to amend as requested since the amendment would "be no more than the substitution of the creditors having the legal rights to assert the claims, for Fidelity Company, which has a beneficial interest in the subject matter", and that such substitution would not constitute a new and different claim. (272 F. 2d at 130).

ARGUMENT

Petitioner seems to concede that since *Hutchinson, Trustee v. Otis, Wilcox & Company*, 190 U. S. 552, it has been the rule in bankruptcy that an amended proof of a claim may be permitted after the expiration of the time for filing and proving where the claim upon which the original proof was made is the same as that ultimately proved, and notwithstanding the fact that the original claim was defective.

Likewise petitioner concedes to some extent the applicability of Rule 15 of the Federal Rules of Procedure providing that whenever the claim asserted in an amended pleading arises out of the transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.[1]

Nevertheless, petitioner contends that the decision of the Court of Appeals directing that amendment be permitted is in conflict with Hutchinson and that it expands the doctrine of relation back beyond the scope intended by F.R.C.P. 15 because, says petitioner, the original claim was predicated on a direct claim for indemnity by the surety against the bankrupt, whereas the amendment asserts a claim by subrogation to the rights of creditors whom the surety paid. Petitioner's argument confuses the pleading

[1] Petitioner concedes a "qualified applicability" by virtue of General Order in Bankruptcy No 37 (11 U.S.C. foll. Sec. 53), but does not show that the qualification of the General Order, that is that the Rules be followed insofar as they are not inconsistent with the Bankruptcy Act or the General Orders, is of any consequence in the case at bar.

of legal theory with the claim itself. This test for denying amendment after the running of a period of limitation, if the theory of the cause of action be changed by the amendment, was rejected by this court in *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, as "no longer accepted as one of general validity"[2] in view of *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570; *Friederichsen v. Renard*, 247 U. S. 207, and *New York Central Railroad Co. v. Kinney*, 260 U. S. 340.

Permitting a recovery for damages under contract although the complaint alleged tort, Judge Yankwich, in *Nester v. Western Union Telegraph Co.*, 25 F. Supp. 478, aff'd. 106 F. 2d 587, reversed on other grounds, 309 U.S. 582, referred to *United States v. Memphis Cotton Oil Co.*, supra, and, pointing out that the liberality of its doctrine is carried over into the Federal Rules of Civil Procedure and broadened, stated "Differences in the forms of claims being abolished, the plaintiff should be denied relief only when, under the facts proved he is entitled to none."[3] In similar fashion it has been held uniformly under the Rules that the complaint is not to be dismissed, or amendment denied, because the plaintiff's lawyer has misconceived the proper legal theory of the claim.[4]

The decision of the Court of Appeals herein not only does not conflict with the decision of this Court in Hutchinson, it does not conflict with any decisions of other circuits. Petitioner overlooks the fact that respondent's claim described in detail the facts giving rise to the claim, that $74,713.07 thereof arose out of payments that respondent had become obligated to pay *as surety* and did so pay. Whether respondent relied upon the express agreement of

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[2] 288 U. S. at 68.

[3] 25 F. Supp. at 481.

[4] See *Dotschay v. National Mutual Ins. Co.*, 5 Cir., 246 F. 2d 221, opinion of Judge Clark in *United States v. Pape*, 2 Cir., 144 F. 2d 778 (a criminal case) at 781; *Cohen v. Randall*, 2 Cir., 137 F. 2d 441, at 444, concurring opinion of Judge Clark in *Atwater v. North American Coal Corp.*, 2 Cir., 111 F. 2d 125, at 126; *Keiser v. Wait*, D. of C., 118 F. 2d 13.

its principal to indemnify the surety, upon the agreement of indemnity that the law implies,[5] or upon its right of subrogation to claims of creditors,[6] the evidence to prove the claim would be that of the payments the surety had made to creditors, and those payments furnished the consideration for the claim. It would be grossly unjust if petitioner Trustee should be permitted to cause the rejection of respondent surety's claim upon his objection that the claim was a 57-(i) claim by a surety to subrogation and therefore must be made in the names of creditors (R. 17) and should also be permitted to cause the rejection of the surety's request to amend upon the objection now asserted by petitioner that the claim was not one of subrogation at all.

The Trustee can not have it both ways as suits his convenience. His misapprehension pointed out above results in the erroneous assertion that the decision of the Court of Appeals below conflicts with others, relying principally upon *Glint Factors, Inc. v. Schnapp*, 2 Cir., 126 F. 2d 207, *Matter of G. L. Miller & Co. Inc.*, 2 Cir., 45 F. 2d 115 and *C.I.T. Corp. v. Himes*, 3 Cir., 98 F. 2d 589, cert. den. 305 U. S. 646. Glint Factors involved neither a claim nor a limitation period but rather had to do with whether preferences alleged by the petitioning creditor were sufficiently identified with those more definitely asserted by amendment to permit the amendment, and held that under F.R.C.P. 15 the amendment was allowable. Matter of Miller has a superfluous resemblance to the case at bar in that the claimant sought by amendment to assert a claim based upon an indemnity agreement. However, the ground for denial of the amendment was not that it asserted indemnity but that in the original claim there was nothing to indicate that claimant was surety as to the particular items asserted by amendment and that the amendment related to entirely different transactions. In view of this the Court stated that it need not consider the question which is involved in the case at bar, that is, whether the names of creditors paid by the

[5] 50 Am. Jur. 1049 Sec. 221 and cases there cited

[6] Sec. 57 (i) of Bankruptcy Act, 11 U.S.C. Sec. 93 (i)

surety could be added after the expiration of the period for proving claims. Himes merely prevented the assertion of a new and different claim on a written guaranty not asserted in the original claim.

Petitioner's footnote cases asserted to be contrary to the opinion below are disclosed by his own explanation to be neither in point with, nor contrary to, the case at bar. The only 57 (i) case cited is Matter of Miller, supra, which expressly did not pass upon the question involved here. The only 57 (i) cases involving amendment that we have found are in accord with the decision below. Thus, in *In re Boggs-Rice Co., Inc., Athens Stove Works v. Fleming*, 4 F. Supp. 431 (reversed on other grounds, 66 F. 2d 855), the District Court for the Western District, Virginia, held that the error of the surety in failing to file proof of claim in the names of creditors paid could be cured by amendment; *In re Salvator Brewing Co.*, 2 Cir., 193 F. 989 approved action of the district court permitting amendment where one endorser had filed proof of debt on behalf of several; and in *Insley v. Garside*, 9 Cir., 121 F. 699; on rehearing 123 F. 78, where the original opinion denied the claim of the sureties for failure to comply with Section 57 (i), on rehearing the district court was directed to give effect to the proof as a claim proven in the name of the creditor and to subrogate the sureties, if and when they paid the creditor.

The case at bar is unique in that it is the only case we have found in which a trustee in bankruptcy has opposed amendment by a surety to comply with Sec. 57 (i) where it has paid creditors after the filing of a petition in bankruptcy involving the principal; and if petitioner's position in opposition to amendment should prevail, the case would stand alone.

CONCLUSION

For reasons stated the petition for certiorari should be denied.

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